Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17480

HAROLD S. HOBSON,

Plaintiff-Appellee,

v.

CYRUS S. EATON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Decided February 12, 1968.

Before: PECK and McCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. Harold S. Hobson, plaintiff-appellee, brought this action against Cyrus S. Eaton and the Cleveland Trust Co., in the United States District Court for the Northern District of Ohio, Eastern Division, for a declaratory judgment (Section 2201, Title 28, U.S.C.) that he is the beneficial owner of certain claims against the Estate of Frank H. Hobson. The deceased, Frank H. Hobson, was not related to the plaintiff-appellee, Harold S. Hobson, either by family or through business. The District

Court granted judgment to the plaintiff-appellee and the defendant-appellant, Cyrus S. Eaton, appealed. We will refer to the parties as plaintiff and defendant, respectively.

Frank Hobson died in 1936 and prior thereto, from 1930, had been vice-president of the Cleveland Trust Company, hereafter called the bank. The defendant was a director of the bank. During the time in question here, the plaintiff was an employee of the defendant. The claims against the Hobson Estate which are the subject of this action arise out of loans made by the defendant to Mr. Hobson during his lifetime. These loans are in two parts: (1) $10,000 which had been advanced to Mr. Hobson in two personal loans of $5000 each on July 11, 1935 and November 20, 1935, and (2) $17,500 loaned by Industrial Shares, Inc., a holding company, completely owned by the defendant. This $17,500 loan was secured by one note of $12,500, dated December 15, 1930, and two notes of $2500 each, dated February 11, 1931 and April 20, 1931.

In 1936, following the death of Mr. Hobson, the plaintiff and the defendant entered into an assignment as follows:

"ASSIGNMENT

Cleveland, Ohio, July 20, 1936.

For the sum of one dollar, and other valuable consideration, the receipt of which is hereby acknowledged, I hereby sell, assign and transfer to H. S. Hobson all my right, title and interest in and to my claim for $10,000.00 against the Estate of F. H. Hobson evidenced by check for $5,000.00 dated July 11th, 1935, and duplicate deposit slip for $5,000.00 dated November 20th, 1935,

together with interest on the said amounts from the date of the said check and deposit slip.

C. S. Eaton sgd

Cleveland, Ohio, July 20, 1936.

I herewith acknowledge receipt of the above claims which have been assigned to me for the purpose of collection, and I agree to pay to C. S. Eaton any proceeds thereof.

H. S. Hobson"

This transaction occurred in the wake of the great depression of 1929 and 1930. The finances of the defendant, to put it mildly, were highly involved and the Estate of Mr. Hobson was greatly in debt. It was apparently understood between the parties at the time the assignment was made that it was only for the purpose of collection. The plaintiff was to file a claim with the Cleveland Trust Company, as executor of Hobson's estate.

The plaintiff claims that a day or two after the execution of the assignment, the defendant called him into his office and said he had changed his mind about having the claim for collection filed in Hobson's name. He could not afford to have his pending settlement with the banks jeopardized by appearing directly or indirectly as a claimant against the Hobson estate. The plaintiff claims that the defendant said on this occasion:

"You take these two claims as a salary bonus. The amount is very small at best and subject to litigation. There may not be anything left, but whatever comes out of this belongs to you."

The defendant denies this conversation.

On July 21, 1936, the plaintiff filed his claims with the bank as executor of the Hobson estate. The claims were allowed by the executor on September 17, 1936. The executor made a partial distribution of the estate on February 11, 1938. A check was issued to the plaintiff in the amount of $6179.58. The plaintiff disbursed this amount by paying to defendant's personal account with Otis and Company $1961.91 and by paying the balance to the defendant.

In 1937 the Ohio Court of Appeals awarded Julia Hobson, a former wife of the deceased Frank Hobson, the income, for life or until remarriage, from 250 shares of bank stock held by his estate. This delayed further activity in Frank Hobson's estate until her death in December, 1960.

On November 17, 1961, on requisition of Frank H. Hobson, Jr., the beneficiary of the estate of F. H. Hobson, deceased, plaintiff's claim was rejected. Thereafter the plaintiff brought an action in the District Court against the bank as Executor of the Estate of Frank H. Hobson, Frank H. Hobson, Jr., and Frank H. Hobson, Jr., as Executor of the Estate of Myra S. Hobson, for recovery on his claims. This action was settled by agreement of the parties in October, 1962. By this settlement, Mr. Hobson was to receive approximately $45,000, including principal and interest. The defendant, Mr. Eaton, was not a party to this action and when he learned of it he brought an action in the Court of Common Pleas of Cuyahoga County to enjoin the bank and Frank Hobson, Jr., from making any further payments to the plaintiff pursuant to the settlement agreement. A preliminary injunction, which is still in force, was issued pending trial. The plaintiff was not a party to this action and he, being a non-resident of Ohio, brought the action now before us in the District Court.

The defendants in this action were Mr. Eaton and The Cleveland Trust Co. Mr. Eaton filed an answer in which he denied plaintiff's claim. He filed a counterclaim in which he sought to have the settlement agreement declared null and void, to require repayment to the Frank Hobson estate of $8999.96 which had been paid to the plaintiff under the settlement agreement and to have himself declared as the beneficial owner of the claims against the Hobson estate. He also sought an order to have Frank H. Hobson, Jr. and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, made parties defendant to respond to his counterclaim. Frank H. Hobson, Jr., individually and as executor of the estate of Myra S. Hobson, were made parties defendant. They filed an answer and counterclaim.

The parties entered into a stipulation that the issues raised by the plaintiff's complaint and any defenses interposed thereto be first tried. It was further stipulated that if the issues were determined in favor of the plaintiff this would be a full and complete determination of all the issues raised by any counterclaims of the parties and any defenses interposed thereto. If the issues raised by the plaintiff were decided in favor of Mr. Eaton, the Court would then try the issues raised by the counterclaims.

The district judge found that the plaintiff was the sole beneficial owner of the claims, that the defendant Eaton had no interest in the claims, that the plaintiff was entitled to the proceeds of the settlement agreement and that the counterclaims of the defendants should be dismissed. In finding for the plaintiff, the trial judge concluded that the plaintiff had established his case by a preponderance of the evidence.

One of the assignments of error is that the trial judge erred in applying the preponderance of evidence rule of

proof to the testimony adduced at the trial. It is claimed on behalf of the defendant that the plaintiff should have been required to prove his case by clear and convincing evidence.

Under the law of Ohio there is a presumption that the beneficiary of a trust does not make a gift of trust assets to his fiduciary, that is, his agent or trustee. *Chockley* v. *Jensen,* 104 Ohio App. 399. The trial judge specifically found that the plaintiff was originally designated as agent for collection only. This clearly created an agency relationship between plaintiff and defendant for the specific purpose of collecting these claims. The relation of principal and agent is generally regarded by the courts of Ohio and elsewhere as a fiduciary one whereby the principal places trust and confidence in the agent to faithfully perform the terms of the agency. *Connelly* v. *Balkwill,* 160 Ohio St. 430; *Manhattan Life Ins. Co.* v. *Smith,* 44 Ohio St. 156. Thus, there arises a presumption that the defendant did not make a gift to the plaintiff of the claims which were the subject of the agency.[1]

The defendant argues that in order for the plaintiff to overcome this presumption he must establish by clear and

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[1] Plaintiff's reliance upon the case of *Brown* v. *Ginn, Trustee,* 66 Ohio St. 316 (1902), is misplaced. That case held that an agent for collection is not a trustee of an express trust and could not bring suit in his own name under a statute which allowed actions to be prosecuted only in the name of the real party in interest except a "trustee of an express trust" who could bring an action in his name as trustee. That case does not stand for the proposition that an agent for collection is not a fiduciary and specifically held that "such a contract is rather one of agency."

[2] Clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not

convincing evidence[2] that subsequent to the assignment the defendant made a gift to him of the claims in question. While ordinarily a presumption may be rebutted or overcome by evidence of equal weight,[3] in Ohio a gift intervivos must be proven by clear and convincing evidence. *Flanders* v. *Blandy,* 45 Ohio St. 108; *In re Estate of Fife,* 164 Ohio St. 449; *Bolles* v. *Trust Co.,* 132 Ohio St. 21.

An assignment of a chose in action without consideration may be the subject of a gift. *Polley* v. *Hicks,* 58 Ohio St. 218. The plaintiff claims that after the initial assignment the defendant gave him the claims as a salary bonus. There was no consideration for this alleged gift. The defendant neither owed the plaintiff any salary bonus nor was there any provision in the contract of employment for the payment of a bonus. Gifts may be made by an employer to his employees. See, e.g., *Renee* v. *Sanders,* 102 Ohio App. 21, affirmed 160 Ohio St. 279. "Bonus normally is a gratuity over and above regulary salary." *Kenney* v. *Spicer Furniture Co.,* 131 N.E.2d 265 (Ohio App.). A bonus, however, may become part of the contract between an employee and an employer and be therefore part of the agreed compensation for service. *Ellis* v. *Elec. Prod., Inc.,* 85 Ohio App. 170; *Mabley & Carew Co.* v. *Borden,* 129 Ohio St. 375. But in the absence of any contract or agreement, a bonus paid by an employer without any return promise made by the employee is in the nature of a gift or gratuity for purposes of determining ownership of the purported gift.

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to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Cross* v. *Ledford,* 161 Ohio St. 469, 120 N.E.2d 118, 123 (1954).

[3] *In re Guardianship of Breece,* 173 Ohio St. 542.

We conclude that if the facts are as plaintiff alleges, any relinquishment of the defendant's ownership in his beneficial interest in the claims against the estate of Frank Hobson in favor of the plaintiff would constitute a gift inter vivos. Therefore, the burden was on the plaintiff, Harold S. Hobson, to prove by clear and convincing evidence that he was the recipient of a gift, from the defendant, Cyrus S. Eaton, of the beneficial interest in the claims involved herein. The trial judge was in error in holding that the plaintiff satisfied this burden of proof in establishing his case by a mere preponderance of the evidence.

We remand the case to the District Court with instructions to the trial judge to reconsider the evidence in the light of the applicable rule of clear and convincing evidence and report his conclusion to this Court. We retain jurisdiction of the appeal.

Appendix B

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. C 63-29

[SAME TITLE]

KALBFLEISCH, J.

This case was tried and submitted on the record, the pleadings, exhibits, stipulations and admissions by counsel, and upon counsel's briefs.

The plaintiff, Harold S. Hobson, is a resident of the State of Indiana. The defendant Cyrus S. Eaton is a resident of the State of Ohio; defendant The Cleveland Trust Company is a corporate citizen domiciled in the State of Ohio and incorporated under the laws of Ohio; and Frank H. Hobson, Jr., and Frank H. Hobson, Jr., as Executor of the Estate of Myra S. Hobson, are residents of the State of California.

Plaintiff's complaint sets forth an action for a declaratory judgment pursuant to 28 U.S.C.A., Section 2201, for the purpose of determining questions of actual controversy between the parties. It is conceded that the Court has jurisdiction and that the matter in controversy exceeds $10,000.00.

Plaintiff alleges that Cyrus S. Eaton made certain loans to one Frank H. Hobson in the total amount of $10,000.00, and that said Frank H. Hobson died on March 31, 1936. These allegations are admitted by defendant Cyrus S. Eaton.

Plaintiff further alleges that defendant Cyrus S. Eaton, for good and valuable consideration, executed and delivered to plaintiff his irrevocable written assignment of Eaton's claims against the Estate of the said Frank H. Hobson arising from said loans and the interest accrued thereon. This allegation is denied by defendant Eaton; however, Cyrus S. Eaton admits he has asserted that he is the beneficial owner of said claims and has brought an action in the Court of Common Pleas of Cuyahoga County, Ohio against the Executor of the Estate of Frank H. Hobson, being case No. 776570, in which action Eaton did not make the plaintiff herein a party. Defendant Eaton admits that in his case in the Court of Common Pleas he seeks to establish his beneficial ownership of the above-mentioned claims.

Plaintiff concludes his first cause of action by alleging that he is the beneficial owner of said claims and is rightfully entitled to the proceeds of the settlement negotiated between plaintiff and the Executor of the Estate of Frank H. Hobson and others. This assertion of the plaintiff is specifically denied by defendant Eaton.

In plaintiff's second cause of action he alleges that Industrial Shares, Inc., a corporation, made certain loans to Frank H. Hobson, evidenced by Hobson's promissory notes payable to it, in the total sum of $17,500.00, and this assertion by plaintiff is admitted by defendant Eaton. Plaintiff further alleges that said promissory notes were negotiated

to the plaintiff, and this allegation is denied by defendant Eaton.

As to plaintiff's second cause of action defendant Eaton admits he has asserted that he is successor in interest to said corporation and as such successor in interest is the beneficial owner of said promissory notes and the claims thereon against the Estate of Frank H. Hobson, and that he has brought an action in the Court of Common Pleas of Cuyahoga County, Ohio (Case No. 776570) against the Executor of the Estate of Frank H. Hobson, in which he seeks to establish his beneficial ownership of said promissory notes and said claims.

Plaintiff concludes his second cause of action by alleging that he is the holder and beneficial owner of said promissory notes and claims and is rightfully entitled to the proceeds of the settlement negotiated between plaintiff and the Executor of the Estate of Frank H. Hobson and others. This allegation is specifically denied by defendant Eaton.

Plaintiff's third cause of action, in addition to incorporating by reference all of the statements and allegations made in his first and second causes of actions, alleges that plaintiff has settled all of the claims referred to in his first and second causes of action with the Executor of the Estate of Frank H. Hobson and with the beneficiary of said Estate. Plaintiff further alleges that pursuant to the settlement agreement said Executor paid said claims in part and the balance agreed upon as due was assumed by said beneficiary. Plaintiff further alleges that to secure payment to plaintiff of said balance said beneficiary deposited certain of his own funds in escrow with defendant The Cleveland Trust Company under an escrow agreement dated October 3, 1962 between plaintiff and the beneficiary,

Frank H. Hobson, Jr. Plaintiff further alleges that in accord with the provisions of said escrow agreement said beneficiary directed defendant The Cleveland Trust Company in writing to make a payment to plaintiff on January 1, 1963 from the said escrow fund in the amount of $8,999.95.

All of the foregoing allegations of the third cause of action are specifically denied by defendant Eaton; however, the foregoing allegations in the third cause of action are admitted to be true in the answers of The Cleveland Trust Company, Executor of the Estate of Frank H. Hobson, and in the answers of the beneficiary, Frank H. Hobson, Jr., and Frank H. Hobson, Jr., as Executor of the Estate of Myra S. Hobson.

Plaintiff caused to be attached to his complaint a copy of the settlement agreement, as Exhibit A, and a copy of the escrow agreement, as Exhibit B. The authenticity and legality of said documents are, for want of knowledge, denied by defendant Eaton, but are admitted by all other parties involved.

For all purposes of this lawsuit the Court hereby finds that the settlement was consummated as alleged and that Exhibits A and B attached to plaintiff's complaint are authentic. (Tr. 267-268, Pltf.'s Exs. 18 and 19.)

Plaintiff concludes his third cause of action by alleging that he has demanded of defendant The Cleveland Trust Company that it make payment to the plaintiff, but that said defendant has refused and still refuses to make said payment to plaintiff and has informed plaintiff that its refusal is due to defendant Cyrus S. Eaton's assertion of beneficial ownership of said claims. This latter allegation is admitted to be true in the answer of defendant The Cleveland Trust Company.

Plaintiff closes his complaint with the prayer that this Court adjudge that he is the beneficial owner of the claims described in his first and second causes of action, and that the Court further adjudge that he is rightfully entitled to the proceeds of the settlement and to the immediate payment of $8,999.95 from defendant The Cleveland Trust Company, and further prays for full and complete performance by defendant The Cleveland Trust Company of all of its obligations under the escrow agreement, and for costs of this action.

Defendant Cyrus S. Eaton, in addition to his answer wherein he takes issue with certain allegations and prayers of plaintiff's complaint, has filed a counterclaim seeking a declaratory judgment and naming as defendants not only the plaintiff and The Cleveland Trust Company but also, by leave of Court, naming Frank H. Hobson, Jr., and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, deceased. The Cleveland Trust Company, in addition to its answer to plaintiff's complaint, has filed a counterclaim seeking a declaratory judgment; and defendants Frank H. Hobson, Jr., and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, deceased, in addition to their answers, also assert counterclaims seeking a declaratory judgment.

On May 10, 1963, counsel for the respective parties named herein executed and filed the following stipulation:

> "It is hereby stipulated and agreed by and between the respective parties, through their undersigned attorneys, that:
>
> "1. The plaintiff having withdrawn his objection to the motion of the defendant Cyrus S. Eaton to add Frank H. Hobson, Jr., and Frank H. Hobson,

Jr., Executor of the Estate of Myra S. Hobson, deceased, as defendants and the court having granted the same, Frank H. Hobson, Jr., and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, deceased, hereby enter their appearance and submit to the jurisdiction of the court.

"2. As soon as this case can be heard, the issues raised by the plaintiff's complaint and any defenses interposed thereto shall first be tried. If said issues are finally determined in favor of the plaintiff, this shall be regarded as a full and complete determination of all of the issues raised by any counterclaims filed by any of the parties to this stipulation and any defenses interposed thereto. If said issues presented by the plaintiff's complaint and the defenses interposed thereto are finally determined in favor of defendant Cyrus S. Eaton, the issues raised by the counterclaims shall then be tried.

"3. Reference is made to Case No. 37,413 docketed in this court and the stipulation of counsel therein of even date herewith with respect to the disposition of a motion by defendant Frank H. Hobson, Jr., in that case.

"4. The Cleveland Trust Company may plead by July 1, 1963."

On June 19, 1963, counsel for the respective parties executed and filed the following stipulation:

"It is hereby stipulated and agreed by and between the respective parties, through their undersigned attorneys, that plaintiff may plead to the counterclaims

of defendants Cyrus S. Eaton, Frank H. Hobson, Jr. and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, deceased, after the issues raised by plaintiff's complaint and any defenses interposed thereto have first been tried."

Leave of Court having been granted, plaintiff filed a reply to the answer and counterclaim of defendant Cyrus S. Eaton, averring "that by reason of prior sworn denials of beneficial ownership of or interest in the claims referred to in plaintiff's first and second causes of action, defendant Eaton judicially admitted that he has no interest whatever in such claims, and he is therefore judicially and equitably estopped by such oaths now to assert that he is the beneficial owner of such claims."

A jury trial having been waived, trial to the Court began and was limited, in accord with stipulations of counsel, to the issues joined by the complaint of plaintiff Harold S. Hobson, the answer and counterclaim of defendant Cyrus S. Eaton, and the reply of plaintiff to the answer of defendant Cyrus S. Eaton. (Tr. 53.)

This case arose from a transaction which occurred on July 20, 1936, at which time defendant Cyrus S. Eaton executed an assignment wherein he did sell, assign and transfer to the plaintiff all his right, title and interest in his claim for $10,000.00 against the Estate of F. H. Hobson. (Pltf.'s Ex. 1.)

One of the many corporations in which defendant Eaton had an interest was Industrial Shares, Inc., a Delaware corporation formed in December of 1929; in fact, the undisputed testimony discloses that Eaton had full and complete control of said company by reason of his owning all of the outstanding shares of common stock. Plaintiff had

been associated with Industrial Shares since June 22, 1931. (Pltf.'s Ex. 8.) On April 30, 1935, the records of Industrial Shares carried the following entry: "* * * Notes receivable F. H. Hobson—$17,500. * * * Write off uncollectible notes receivable and interest accrued." (Pltf.'s Ex. 9-F.) There were three promissory notes, one for $12,500 and two for $2,500 each. (Pltf.'s Exs. 1-D, 1-E and 1-F.) The maker of the notes was F. H. Hobson and the payee therein was Industrial Shares, Inc. Regardless of when and how Hobson had obtained possession of the three notes, they bear the endorsement of Industrial Shares, Inc., signed by the secretary-treasurer L. G. Watson, and on July 20, 1936, defendant Eaton assigned the three notes to plaintiff at the time he assigned the aforementioned claim of $10,000. (Tr. 13 and 358.)

At the time of the execution of plaintiff's Exhibit 1 it was understood and agreed between plaintiff, H. S. Hobson, and defendant Cyrus S. Eaton that plaintiff was to file in his name a claim with The Cleveland Trust Company, Executor of the Estate of F. H. Hobson, said claim to consist of the three promissory notes of F. H. Hobson to Industrial Shares, Inc., Cyrus S. Eaton's check in the sum of $5,000 payable to F. H. Hobson and dated July 11, 1935, and a Cleveland Trust Company deposit slip dated November 20, 1935, evidencing a deposit for the checking account of F. H. Hobson in the sum of $5,000. (Pltf.'s Exs. 1-A and 1-G.) It was further understood and agreed that the assignment (Pltf.'s Ex. 1) should be presented as evidence of H. S. Hobson's ownership of said claim; however, it was further understood and agreed that plaintiff, H. S. Hobson, was the agent for collection only of this asserted claim and was required to account to defendant Cyrus S. Eaton for any collections he might receive.

In connection with the execution of plaintiff's Exhibit 1 and the entering into of the above stated agreement, a second document was prepared. This second document is plaintiff's Exhibit 2, which is identical with plaintiff's Exhibit 1 except that in addition to the provisions set forth in plaintiff's Exhibit 1 the following appears:

"Cleveland, Ohio, July 20, 1936.

"I herewith acknowledge receipt of the above claims which have been assigned to me for the purpose of collection, and I agree to pay to C. S. Eaton any proceeds thereof.

[Signed] H. S. Hobson"

Plaintiff has admitted the genuineness of plaintiff's Exhibit 2 and his signature thereon.

As between plaintiff, H. S. Hobson, and defendant Cyrus S. Eaton there is no dispute as to any of the facts heretofore stated. The issue between them is related to what transpired immediately after the execution of plaintiff's Exhibits 1 and 2. It is plaintiff's contention that on either July 20 or July 21, 1936, after plaintiff's Exhibits 1 and 2 were executed but before he actually filed the claim with The Cleveland Trust Company, Executor, he had a further understanding and agreement with defendant Eaton. Plaintiff testified that Mr. Eaton called him into his office and that Eaton said he had changed his mind about presenting the claim for collection in Hobson's name; that he could not afford to jeopardize the pending settlement with the banks by appearing directly or indirectly as a claimant against the estate of Frank Hobson. Plaintiff further testified that defendant Eaton then stated: "You take these

two claims as a salary bonus. The amount involved is very small at best, and subject to litigation there may not be anything left, but whatever comes out of this belongs to you." The foregoing assertions of plaintiff were denied by defendant Eaton.

Plaintiff, Hobson, and defendant Eaton have admitted that on July 21, 1936, the plaintiff filed his claims and sub-exhibits (Pltf.'s Exs. 1-A and 1-G) with The Cleveland Trust Company, Executor of the Estate of F. H. Hobson, and that said claims were allowed by the executor on September 17, 1936.

On February 11, 1938, the executor of the F. H. Hobson Estate made a partial distribution of the estate by executing a check payable to H. S. Hobson in the sum of $6,179.58. (Pltf.'s Ex. 17.) This exhibit bears but one endorsement, that of H. S. Hobson. The plaintiff disbursed the proceeds by paying into defendant Eaton's personal account with Otis & Company the sum of $1,961.91, and paid the balance to defendant Eaton. (Tr. 42, 381, 382, 383.)

Between the time of the filing of the claim, July 21, 1936, and the payment of the dividend on February 11, 1938, litigation in the State Court between Julia Hobson and the Frank Hobson Estate was terminated. Both plaintiff, Hobson, and defendant Eaton closely followed the progress of this litigation and knew of its outcome and of the dividend or distribution which was to be made by the executor of the F. H. Hobson estate. Plaintiff testified that on or about the date the executor distributed the dividend (February 11, 1938) he had a discussion with defendant Eaton wherein Eaton told him how valuable he was to him, that the future looked very promising for a comeback and that a settlement with the bank was very close to being com-

pleted. Plaintiff further testified that Eaton asked him to turn over the dividend that was coming from the Frank Hobson Estate, and that "we were sorely in need of cash at that time." Plaintiff testified that he agreed to turn over the dividend and then asked Eaton, "Now, should I turn over to you the dividend on the $10,000 and turn over to Industrial Shares the dividend on the $17,500?"; that Eaton answered, "No, turn it over to me"; and that Eaton further said, "The balance of it, of course, is yours. You may get something out of it some day." Plaintiff, Hobson, further testified that Eaton told him he would participate "in what was recovered out of our debacle at that time, and also participate in the going forward in the recovery that we expected to make." (Tr. 40, 41.) This testimony of plaintiff, Hobson, is denied by defendant Eaton.

On November 17, 1961, on requisition of Frank H. Hobson, Jr., the beneficiary of the estate of F. H. Hobson, the claim of plaintiff, H. S. Hobson, was rejected. (Incidentally plaintiff is not related to F. H. Hobson or Frank H. Hobson, Jr.)

On December 13, 1961, plaintiff, H. S. Hobson, filed a complaint in this Court, the same being Civil Case No. 37,412, against The Cleveland Trust Company as Executor of the Estate of Frank H. Hobson, Frank H. Hobson, Jr., and Frank H. Hobson, Jr., Executor of the Estate of Myra S. Hobson, seeking recovery on his claims. On October 3, 1962, case No. 37,412 was fully settled and terminated upon the terms and conditions contained in plaintiff's Exhibits 18 and 19.

In 1939 plaintiff and defendant Eaton entered into negotiations, the purpose of which was to terminate plaintiff's employment with defendant Eaton. These negotiations in-

cluded a final accounting as to the properties and other assets which defendant Eaton had caused to be placed in the name of and in the possession of plaintiff, Hobson. They included the execution of deeds and the surrender of possession of the property in which plaintiff and his family had been residing, and it was not until 1941 that the termination was finalized. In the course of these negotiations there were discussions between plaintiff and defendant Eaton; however, at no time were the claims of plaintiff against the Estate of F. H. Hobson mentioned or brought into the discussions. Defendant Eaton did not at any time communicate with plaintiff on the subject of the claims against the Estate of F. H. Hobson after February 11, 1938, until May of 1961 when Mr. William R. Daley notified plaintiff that Mr. Eaton was asserting his beneficial interest in said claims.

From the time of the filing of plaintiff's claim against the Estate of F. H. Hobson, on July 21, 1936, defendant Eaton did not notify or otherwise communicate his claim of ownership to any of the defendants in this case.

There is no dispute that plaintiff was employed by defendant Eaton personally from 1929 until sometime in 1939. From 1936 until his termination in 1941 plaintiff was employed by Otis & Company as a licensed salesman. Plaintiff was also employed by Industrial Shares, Inc., and served as an officer in that company from 1931 until its statutory death. As an employee of defendant Eaton plaintiff kept books; did all manner of odd jobs under the direction of Mr. Eaton; he held title in his name to real estate and other assets belonging to defendant Eaton; he supplied most if not all of the records and documents to the auditors preparing the Scovell-Wellington report

(Pltf.'s Ex. 25); and he prepared financial statements for defendant Eaton's signature. (Pltf.'s Exs. 4, 5 and 6.) Acting as defendant Eaton's nominee, plaintiff collected rents and managed properties; and from time to time he chauffeured defendant Eaton from his home to his office.

Defendant Eaton's activities and interests from 1929 until 1939 defy description. The record evidences that he owned or had a substantial interest in industrial businesses, banks and securities amounting to many millions of dollars. The collapse of the economy, commonly referred to as "the depression of the 1930's," reduced the value of his holdings to the point of insolvency; his debts exceeded his assets by many millions of dollars. Defendant Eaton was a partner in the firm known as Otis & Company, a corporation which dealt in securities and other banking activities on a world-wide basis. The partnership was heavily indebted to four banks in Cleveland which had been placed in liquidation under the control of the Superintendent of Banks. In addition to defendant Eaton's liabilities as a partner in Otis & Company, he was a guarantor for debtors indebted to Otis & Company. As would be expected of the liquidators of the closed banks, they diligently pursued an investigation into the affairs and assets of defendant Eaton and others.

Defendant Eaton, in selecting plaintiff as the nominee to hold real estate and other assets in plaintiff's own name, had a contract which required that plaintiff account to defendant Eaton for all transactions connected with his activities as nominee, and that he surrender unto defendant Eaton all of the said properties and assets upon defendant Eaton's request or demand. Defendant Eaton has testified that he had similar arrangements with others in his employ.

Defendant Eaton and others in his employ, principally William R. Daley, were vitally interested and active in ne-

gotiating a compromise with defendant Eaton's creditors, the principal creditor being Union Properties, Inc., and/or the liquidator of the closed banks. It would be unrealistic to overlook or ignore the apparent desire of defendant Eaton and those associated with him to salvage everything possible of value under the then existing circumstances. If defendant Eaton's placing of properties and assets in the names of others was not deliberately done to conceal his interest therein, it is apparent that his failure to disclose such items inured to his benefit as though he had so intended.

In the course of the negotiations leading up to the compromise and settlement of defendant Eaton's debts—which the evidence discloses he settled by his promissory note in the sum of $185,000.00—the defendant executed three financial statements. (Pltf.'s Exs. 4, 5 and 6.) Defendant Eaton was deposed on December 30, 1939 (Pltf.'s Ex. 22), and was again deposed on February 2, 1943 (Pltf.'s Ex. 23). It is plaintiff's contention that in plaintiff's Exhibits 4, 5 and 6 and the two depositions defendant Eaton not only did not disclose any interest in the claims against the F. H. Hobson Estate, but when asked in the depositions (Pltf.'s Exs. 22 and 23) to state what property or assets he owned in 1938, he did not state that he owned any interest in the claims against the F. H. Hobson Estate. The pages in plaintiff's Exhibit 22 upon which plaintiff relies are pages 1, 2, 7, 27-30, 39, 68 and 69; and the pages relied upon by plaintiff in plaintiff's Exhibit 23 are pages 14, 15, 23, and 42-45. Plaintiff's Exhibits 22 and 23 were admitted into evidence without objection by defendant Eaton.

Plaintiff urges that defendant Eaton's financial statements (Pltf.'s Exs. 4, 5 and 6) and Eaton's testimony in the

two depositions (Pltf.'s Exs. 22 and 23) are not only inconsistent with his present position in this case but are consistent with the allegations of the plaintiff herein. Plaintiff further urges that, based upon plaintiff's Exhibits 4, 5 and 6 and the cited pages of plaintiff's Exhibits 22 and 23, and the Scovell-Wellington report (Pltf.'s Ex. 25), defendant Eaton is prevented under the doctrine of preclusion from contradicting his own prior sworn statements. Both counsel for the plaintiff and defendant Eaton have exhaustively discussed and briefed their respective interpretations of the preclusion doctrine. Neither counsel has cited, nor has the Court found, any case or any authority for the application of the preclusion doctrine where the alleged contradictory or inconsistent sworn statements were made or uttered other than in a judicial proceeding. Many authorities have refused to apply the doctrine where there has been a failure to prove that the party now asserting preclusion relied on the prior contradictory or inconsistent statements. It is my conclusion that the doctrine does not apply in this case. Although I have concluded that the prior contradictory and inconsistent statements of defendant Eaton are insufficient to apply the doctrine of preclusion, I do find that such statements are of great importance in determining the credibility of defendant Eaton.

At the close of the plaintiff's case in chief, defendant Eaton requested leave to file an amended answer setting forth the statute of frauds. The Court suggested that counsel submit, in proper form, the answer he proposed to file. The Court finds such proposed amendment among the pleadings; however, it was never filed, nor does the record show that the Court acted upon the request to file such amended answer. Notwithstanding this state of the record, counsel

for both sides have exhaustively briefed the question of the application of the statute of frauds. The defendant insists that the statute in effect at the time of the alleged transfer of the claim from defendant Eaton to plaintiff, Hobson, was Ohio General Code Section 8384, and that since the evidence discloses that the transfer involved a chose in action of the value of more than $2,500, and the transfer was neither partially performed nor in writing, that therefore plaintiff is barred from any judgment or relief sought in plaintiff's complaint. This contention of defendant Eaton must fall for two reasons: (1) the transfer was fully performed at the time plaintiff filed the claims with the executor; and (2) the act of transfer was nothing more than a modification of the written agreement evidenced by plaintiff's Exhibits 1 and 2. It is therefore my conclusion that the statute of frauds is not applicable.

It is my conclusion and judgment that plaintiff, Hobson, has proved by a preponderance of the evidence that he is the true and beneficial owner of the claims described in plaintiff's first and second causes of action and is rightfully entitled to the proceeds of the settlement thereof in accord with plaintiff's Exhibits 18 and 19. It is my further conclusion that defendant Cyrus S. Eaton has no interest whatever in the claims described in plaintiff's first and second causes of action.

The foregoing is adopted as findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

GIRARD E. KALBFLEISCH
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17480

HAROLD S. HOBSON,

Plaintiff-Appellee,

v.

CYRUS S. EATON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, E.D.

Decided September 20, 1968.

Supplement to opinion of February 12, 1968.

Before: PECK and McCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. In our opinion of February 12, 1968, we held that the burden was on plaintiff, Harold H. Hobson, to prove by clear and convincing evidence that the defendant, Cyrus S. Eaton, had relinquished his beneficial interest in claims against the estate of Frank Hobson, and that he had made a gift of such claims to him. We con-

cluded that the trial judge was in error in holding that the plaintiff satisfied this burden of proof in establishing his case by a mere preponderance of the evidence.

Retaining jurisdiction of the appeal, we remanded the case to the District Court with instructions to the trial judge to reconsider the evidence in the light of the applicable rule of clear and convincing evidence and report his conclusion to this Court. In compliance with this remand, the trial judge concluded in a report entitled "Conclusion Upon Remand" filed in this Court and made a part of the record on this appeal, "that the plaintiff, Harold S. Hobson, has proved by clear and convincing evidence that he was the recipient of a gift, from the defendant Cyrus S. Eaton, of the beneficial interest in the claims involved herein."

We have considered the report of the trial judge together with the briefs of the parties with reference thereto and conclude that the supplemental finding of the trial judge is supported by the evidence and is not clearly erroneous.

Judgment of the District Court is affirmed.

Appendix D

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order or judgment was entered in this court on Jun 27 1968.

J. A. Green, Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CIVIL ACTION No. C 63-29

HAROLD S. HOBSON

v.

CYRUS S. EATON, et al.

CONCLUSION UPON REMAND

KALBFLEISCH, Ch. J.

The Court is in receipt of a mandate dated May 27, 1968 and filed with the Clerk of this Court on May 28, 1968. The mandate is a remand to this Court for further proceedings in conformity with the opinion of the Court of Appeals filed with the Clerk, Carl W. Reuss, on February 12, 1968.

On page 7 of its opinion the Court of Appeals stated as follows:

"The trial judge was in error in holding that the plaintiff satisfied this burden of proof in establishing his case by a mere preponderance of the evidence.

"We remand the case to the District Court with instructions to the trial judge to reconsider the evidence in the light of the applicable rule of clear and convincing evidence and report his conclusion to this Court. We retain jurisdiction of the appeal."

In conformance with the February 12, 1968 opinion of the Court of Appeals and upon a careful and thorough reconsideration of the evidence, the appendix to brief of defendant-appellant, and the appendix to brief of plaintiff-appellee, the Court finds and concludes that the plaintiff, Harold S. Hobson, has proved by clear and convincing evidence that he was the recipient of a gift, from the defendant Cyrus S. Eaton, of the beneficial interest in the claims involved herein.

/s/ GIRARD E. KALBFLEISCH
Chief Judge